

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)	
Plaintiff,)	13cr00220 (RJD)
)	
V.)	United States Courthouse
)	Brooklyn, New York
)	
BEBARS BASLAN,)	JULY 10, 2014
)	
Defendant.)	
_____)	

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: KELLY T. CURRIE
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1 THE CLERK: United States versus Baslan, 13CR220.
2 Counsel, please state your appearances.

3 MR. SMITH: Tyler Smith and Tiana Demas for the
4 United States. Good morning, your Honor.

5 THE COURT: Good morning.

6 MS. DEMAS: Good morning, Judge.

7 MR. SAVITT: Ephraim Savitt for Bebars Baslan. And
8 also at counsel table is Tamera Patskerez (phonetic), my
9 paralegal. Good morning, your Honor.

10 THE COURT: Good morning.

11 Good morning, Mr. Baslan.

12 THE DEFENDANT: Good morning.

13 THE COURT: We've convene today principally to
14 address an application by Mr. Savitt, to either preclude the
15 admission of certain evidence, or, in the alternative, to
16 grant him an extended adjournment of the trial, given his
17 trial schedule, he advises us, will take us well into 2015.
18 Ms. Mulqueen, I believe, informed you, having reviewed these
19 papers, my inclination is to proceed with the trial. But I
20 thought it appropriate that we give everyone an opportunity to
21 be heard. And I have a couple of questions I'd like to put,
22 before I finally rule, to the government with respect to
23 witnesses or prospective witnesses that are identified as
24 victim one and victim two.

25 I believe in your letter to the Court, you advised

1 that you became aware of their existence approximately a year
2 ago?

3 MR. SMITH: More than that. In -- shortly after the
4 defendant's arrest in March 2013.

5 THE COURT: And how did that come about, if I may
6 ask?

7 MR. SMITH: One of the victims contacted the FBI.

8 THE COURT: I see.

9 MR. SMITH: And we subsequently found the other
10 victim as a result of that contact.

11 THE COURT: How much material is there to turn over?
12 And I take it by now you've turned it over?

13 MR. SMITH: With respect to the victim statements, I
14 don't know what the actual page count was.

15 THE COURT: Roughly?

16 MR. SMITH: Forty pages, at most. Probably less
17 than that, your Honor.

18 THE COURT: And you've gleaned your file, carefully
19 identifying any Giglio material with respect to these
20 witnesses?

21 MR. SMITH: We'll disclose additional Giglio today.
22 I think that all the Giglio disclosures that we would make are
23 also contained in the witness statements; that's the method by
24 which we learned about any Giglio material, but we'll also
25 separate it for counsel, so that he can be sure as to what we

1 believe constitutes essential Giglio, at the very least.

2 THE COURT: At the time of these incidents, was
3 there any complaint filed with the authorities?

4 MR. SMITH: No.

5 THE COURT: Well, you know, putting these legal
6 discussions, 413, 414, 404(b), for that matter, to the side
7 for the moment, it's hard to imagine -- and it's almost
8 implicit, Mr. Savitt, in your application for adjournment.
9 It's hard to imagine that this information wouldn't be
10 admitted, notwithstanding, with 403 analysis, which, I agree,
11 is critical, because it has potentially significant impact on
12 the defense. It's just hard to imagine, as a matter of common
13 sense.

14 I'll rule, finally, on Rule 413 and 414, because,
15 much to my surprise, never having dealt with these issues in
16 the past, there's a lot of case law out there, most of it
17 favoring the government's position, but I haven't reviewed it
18 all. I'm going to do that. But I'm saying, now, the
19 overwhelming likelihood is that this is going to come in.
20 Indeed, it's probably a classic example of 404(b), far more
21 compelling than most 404(b) presentations I get from the
22 government in routine cases, but you don't have to agree with
23 that.

24 You also state in your letter that it's apparent
25 that from the tapes, the jailhouse tapes, that the defense was

1 aware of either these incidents or matters similar to these
2 incidents. Could you elaborate on that?

3 MR. SMITH: It's not actually from the jailhouse
4 tapes. The jailhouse informant also informed the government
5 that Mr. Baslan had talked to him about the fact that there
6 were minors who he had -- I believe the quote from the
7 jailhouse informant was that he had gotten away with sexually
8 assaulting minors in the Buffalo area. And in defense
9 counsel's letter, they reference the fact that Mr. Baslan had
10 indicated that to the jailhouse informant. So it certainly
11 isn't a surprise to him that these victims exist and that
12 at least claim to be sexually assaulted by him. In addition,
13 I'll just note that contact information for both victims is in
14 his phone. He searched for one by name on Google, on
15 March 9th, 2013, ten days before he was arrested in this case.

16 THE COURT: Well, with respect to victim one, that
17 was apparently a longstanding -- according to your
18 information, a longstanding relationship, relatively long
19 standing. These weren't isolated incidents.

20 MR. SMITH: They certainly weren't isolated
21 incidents. As to either victim, there was a relationship.
22 This wasn't -- they didn't get dragged into a van off the
23 street.

24 THE COURT: It's hard to imagine that this comes as
25 a great surprise to the defense. Indeed, Mr. Cariddi, one of

1 the former lawyers, in one of the letters, I recall, made
2 inquiries or at least made comments about tapes that might be
3 available depicting adult-heterosexual sex, and his concern
4 that they not be -- I guess his preliminary concern is that he
5 know exactly what the government had. And knowing Mr. Savitt
6 and his skill, the availability of 413 and 414, in these
7 cases, it's hard to imagine the defense is sandbagged by this,
8 but I'm happy to listen.

9 MR. SAVITT: Well, your Honor, I have to confess
10 that -- first of all, I appreciate your allusion to my skill,
11 such as it is, but I did feel sandbagged when I saw this
12 stuff. I don't know what Mr. Cariddi was referring to.
13 There's another sex tape on Mr. Baslan's phone, which involves
14 the codefendant Kristen Henry. I did not have any notice,
15 personally, until the 27th that there would be evidence ten
16 years old, involving two woman up in Buffalo, complete with
17 threats of blackmail, extortion, until literally the two-week
18 period that 413 allows the government to turn over the
19 evidence. So they've complied with 413's notice requirement.

20 THE COURT: You choose your words very carefully, as
21 I would expect you to. You felt you were sandbagged, or
22 whatever it was.

23 MR. SAVITT: Surprised, actually.

24 THE COURT: You felt surprised by what? The
25 government's late disclosure or by the fact that these

1 incidents occurred, allegedly?

2 MR. SAVITT: By the fact that these incidents
3 occurred, although --

4 THE COURT: I would imagine, given the information
5 in the record.

6 MR. SAVITT: Well, there's nothing in the discovery
7 to date that had anything to do with this information.

8 THE COURT: I understand that.

9 MR. SAVITT: I understand that the government
10 assumes that I'm going to get all the information from the
11 best source possible; that's not always the case, your Honor.

12 THE COURT: Doesn't relieve the government of their
13 obligation, either.

14 MR. SAVITT: Correct.

15 THE COURT: That's not what I'm getting at. He may
16 or may not be -- he is the best source possible, if, indeed,
17 these incidents occurred as these victims described them. But
18 the very subject matter of prior sexual activity with minors
19 seems, to me, to be such a compelling area of inquiry. That's
20 why I refer to your skill and Mr. Cariddi's earlier letter, as
21 to why I find it somewhat surprising. I'm sorry. I
22 interrupted you. Go ahead.

23 MR. SAVITT: There's obviously a lot of information
24 in the computer files, and there are terabytes full of
25 information that I'd rather not look at, because it would

1 probably take me longer than my projected lifespan to look
2 through all this stuff. But as a practical matter, there's
3 nothing that the government turned over pursuant to our
4 request, including the 404(b) request, prior to June 27th that
5 would alert me to this. And, you know, I can read pretty
6 well. I have glasses. I can read, and somewhat haltingly, as
7 Judge Nickerson once said, in a joking matter, to a lawyer
8 that kept interrupting me.

9 I can read, but I can't investigate, at this point.
10 I can't go out to Buffalo and talk to other people, now that
11 I'm aware of this entire topic, over the weekend and come up
12 with some reasoned defense to this. Of course, I can
13 cross-examine them. I can look at the 3500 materials and see
14 that they've already made misstatements, but I can't overcome
15 their testimony if it's put into the government's case in
16 chief with any rebuttal witness, because I don't have the time
17 for it. I'm happy to go to trial next week. I'd love to go
18 to trial next week because, frankly, that's what I was geared
19 to do, and I still hope we do that.

20 But if we put in this additional evidence, then I
21 really am being blind-sided. It's not the same thing. It's
22 not a question of a plan to deal with babies. I don't think
23 I'm really splitting hairs here. These are young woman who
24 are models, who claim that Mr. Baslan took advantage of them.
25 I understand that it's statutory rape, whether or not they

1 consented. I understand all that. But we're talking about a
2 different kettle of fish here in the universe of sex crimes or
3 child sex crimes.

4 THE COURT: Not sure I agree with you, but I'm
5 listening.

6 MR. SAVITT: And the problem that I have is that
7 we're going to be throwing in not only prior acts -- even if
8 you accept the government's position, as you're, apparently,
9 inclined to do or at least thinking in those terms, but then
10 we come in with alleged extortions, and blackmails, and sex
11 with mothers of these girls and the defendant allegedly
12 forcing them to sign affidavits that they never had sex with
13 him. And that just brings in -- what it does is it appends a
14 much greater area of inquiry and -- to try without really any
15 notice than the original crime itself.

16 MR. SMITH: Your Honor, if I could be heard in
17 response?

18 THE COURT: Sure.

19 MR. SMITH: As to just a factual matter, we did
20 provide a copy of the defendant's iPhone records to
21 Mr. Savitt. That included contact information for both of the
22 victims, as well as photographs of one of them, taken in 2005,
23 we believe. In addition, you know, he makes --

24 THE COURT: Compromising photographs?

25 MR. SMITH: No, not compromising photographs,

1 your Honor. He makes reference to the fact that the victims
2 have identified affidavits. That evidence was on the
3 defendant's computer. He certainly knew that those things
4 were on his own computer, affidavits that had the names of the
5 victims, which purported to indicate that the victims had
6 never been sexually assaulted by the defendant, not signed
7 affidavits, draft affidavits, and -- which is consistent with
8 the victims' statements that he presented them with affidavits
9 that he wanted them to sign, following the occasions on which
10 he raped them, actually, years later.

11 I'd also note that, to the extent that Mr. Savitt's
12 making a due process argument, which comes up in his second
13 letter, due process has been considered in connection with 314
14 and 414, in four different circuits, the 9th, 8th, 7th and
15 10th, and each one of them found there is no due process issue
16 with either of those rules. In addition, I note that in
17 U.S. v. Engene (phonetic), the 10th Circuit case on point, it
18 specifically noted that -- as to the 15-day notice period,
19 that period protects against surprise and allows the defendant
20 to investigate and prepare cross-examination. It permits the
21 defendant to counter uncharged crimes evidence with rebuttal
22 evidence and full assistance of counsel.

23 It's also consistent with the kind of notice that
24 courts have routinely found appropriate for other-act
25 evidence, as we cite. Two weeks is commonly found to be

1 sufficient for other-act evidence. And, finally, to the
2 extent that Mr. Savitt is saying that -- I mean, he's not
3 saying that we didn't provide notice that is timely under the
4 rule. We obviously did. What he's saying is that he's
5 surprised, but it's the government's obligation to provide
6 notice. It is not our obligation to make sure that defense
7 counsel is informed by his own client of potential matters
8 that may be relevant.

9 THE COURT: Well, I understand all of that. My
10 concern is the basic fairness, under the due process argument,
11 that there's a Constitutional (sic) inherent in 413 and 414.
12 The argument here is the impact of this evidence may be so
13 severe -- I haven't spoken about 403 yet -- that it
14 requires -- in fairness, it requires additional time to
15 investigate. That's what I understood.

16 MR. SAVITT: That's correct.

17 MR. SMITH: Your Honor, what I would say is that in
18 every case in which 413 or 414 is implicated, it necessarily
19 involves an allegation or a proved prior conduct involving
20 sexual assault and/or child molestation. That's the sole
21 thing that the rule allows evidence of. So that's true of
22 every case. It was certainly true in the heads of the
23 drafters of the rule, when determining that 15 days was
24 appropriate.

25 MR. SAVITT: I'm not quarreling with what was going

1 on in the heads of the drafters of the rule. I don't know
2 what was going on in their heads, quite frankly. I'm not
3 challenging the constitutionality of the rule. What I'm
4 challenging is the government's methodology in this case of
5 pulling a fast one at the last moment. But here's my
6 problem --

7 THE COURT: I can understand your problem, but let's
8 avoid mischaracterizations. I mean, there's a history here,
9 and without question your client has some responsibility
10 there. If the government had come to me earlier seeking a
11 protection, in view of their concern that Mr. Baslan might be
12 inclined to attempt to undermine certain evidence or the
13 testimony of certain witnesses, I would be likely very
14 receptive to that, given what I have listened to and read. So
15 the government's position is not -- they're not out to get
16 you, they're out to protect their case. That doesn't solve
17 your problem.

18 MR. SAVITT: Well, you know, the flip side of that
19 coin is that I do feel that I'm completely taken by surprise.
20 I'm trying to be as mild about this as possible. Why is it
21 that the prosecutor cites the cases where judges have had an
22 opportunity -- and some cases as long as three months, in
23 Judge Ross' case -- before trial to conduct a hearing, to make
24 a reasoned judgment under all the rules, including 403, and
25 based on a record that is solid, and where some evidence has

1 been precluded, some of the proffers 413, 414 evidence has
2 been precluded, and some has been permitted --

3 THE COURT: I haven't gotten there yet.

4 MR. SAVITT: I understand.

5 THE COURT: We're talking about the general
6 question, the admissibility of the tape of the evidence of
7 prior incidents. The details to which you refer, I haven't
8 gotten to, and I'll call upon the government to give an
9 extended proffer, so that if there are some legitimate areas
10 within that sphere of evidence, I can make appropriate
11 rulings. There's also 403 concern. As I said before, you
12 know, that's -- nobody can -- the rules may make this
13 information presumptively admissible; I appreciate that and
14 understand it. That doesn't mean it's necessarily admissible.
15 It's a question of undue -- quote unquote "undue prejudice,"
16 and God knows that the evidence may very well have a
17 significant impact on the case.

18 On the other hand, I propose, like my 404(b)
19 comment, it may very well go directly to the one issue we're
20 going to try in this case, which is whether or not Mr. Baslan
21 intended to do what the government alleges he was planning to
22 do. I mean, that's -- I just -- I just cannot conceive of
23 that situation, where I would rule on this -- inadmissible in
24 its entirety.

25 Yes, sir.

1 MR. SMITH: Just one other thing, I just wanted to
2 express that one of the reasons that the government wasn't
3 going to provide early disclosure of this information is that
4 the victims had identified that they were afraid of the
5 defendant. One of them actually indicated to someone else
6 that he had at some point indicated to her that he could get a
7 hit man, that he knew people who he could hire to kill
8 someone. So, I mean, certainly we could have sought a
9 protective order from the Court, but ultimately what we're
10 talking about and what we disclosed to counsel were witness
11 statements, which absent Rule 413 would not have been
12 disclosable early. And, in fact, you know, the law on that is
13 quite clear that witness statements have to be disclosed by
14 the government after a witness has testified.

15 THE COURT: If those witness statements include
16 allegations of prior crimes, you've got a 404(b) demand as
17 well. And nobody, especially this Court, would be
18 particularly happy if that suddenly exploded in the middle of
19 trial.

20 MR. SMITH: The issues come up, and 413 actually has
21 exploded immediately prior to trials in -- there is a 5th
22 Circuit case on point in which the government found out about
23 a prior victim a day before trial, and in which the judge
24 denied a recess that the defense had sought for additional
25 time that was affirmed on appeal to the 5th Circuit.

1 THE COURT: As I said, there are a lot of cases.
2 I'm going to be reading them over the weekend. Suffice it to
3 say, we will go forward. And the likelihood is -- we won't
4 get into it in our opening statements. The likelihood is this
5 evidence, to some extent, will be admissible. I want an
6 extended proffer from the government, with respect to the
7 government, each of these witnesses shared with Mr. Savitt, so
8 that if there are more narrowly tailored objections to some
9 content, I can rule on that, hopefully, in advance of the
10 testimony. And in advance of the defense, it's hard to make a
11 final 403 determination.

12 I mean, it's inconceivable to me that the issue that
13 I identified, the intent of Mr. Baslan, is not going to be
14 front burner in the course of this trial. But, nonetheless,
15 403 is a critical aspect of this analysis, and I will not make
16 it until I have some sense as to how the case is going to be
17 defended. All right. I'd like to take advantage of your
18 presence here to address, albeit briefly, a couple of other
19 things, hopefully, in the interest of saving some time. There
20 are some -- obviously the reference to possible sentence, as a
21 general matter, is not relevant and doesn't come in. I say as
22 a general matter because I don't know who the witnesses are
23 going to be. I don't know what they're facing, so forth and
24 so on, but as a general matter, yes.

25 Tell me, if you would, how the trial's going to

1 proceed.

2 MR. SMITH: Your Honor, I expect that we'll call law
3 enforcement as our first several witnesses, and I think we're
4 currently planning to start with an NYPD detective who took
5 the original complaint, not for the content of that complaint.
6 And then the primary evidence the government will then have
7 will be the recordings themselves, introduced through the
8 agent who set up the recording system. After that, we expect
9 evidence as to the search of Mr. Baslan's apartment. We'll
10 introduce witnesses regarding the cracking of the encryption
11 on his hard drive as to his computer evidence. And then the
12 government will either call or decide not to call the
13 confidential informant.

14 THE COURT: All right. Now, you make reference to
15 the encryption, and you have an application asserting a law
16 enforcement privilege, which certainly exists; it's not a
17 common source of controversy, but I don't know what
18 Mr. Savitt's claims are. I don't know what his defense is. I
19 recognize there is a limited, rather qualified, privilege to
20 law enforcement. I'm sensitive to it. But it's hard for me,
21 in the advance of specific testimony, absent Mr. Savitt's
22 representation. But I acknowledge it, and if it becomes
23 relevant, then the privilege is going to have to give way. If
24 not -- I mean, it's not going to be any argument, I assume,
25 that this material, encrypted or not, was on this device.

1 MR. SMITH: And, your Honor, if you'd like --

2 THE COURT: That's inconceivable to me, but --

3 MR. SMITH: -- I can certainly give a fuller proffer
4 on what the witness can say that wouldn't implicate the law
5 enforcement privilege. What we expect the witness who
6 actually decrypted the device to testify to is that he took
7 that device, which was a specific type of hard drive, which is
8 encrypted; he then bought the exact same device. Using that
9 duplicate device, he put his own information on it, encrypted
10 it using their protocols. And then the part that is sensitive
11 is he then developed a process that would decrypt his
12 duplicate. He applied that process to the defendant's device,
13 and that decrypted the data.

14 The witness who has been involved in encryption
15 since he got his PhD in 1986 will also testify that if you
16 decrypt a device, the only thing you can possibly get is
17 either what information was there before or nothing. There is
18 no way to decrypt a device and get something that wasn't
19 there.

20 THE COURT: Is this going to be the focus of your
21 case, in any way?

22 MR. SAVITT: I don't foresee that as happening.

23 THE COURT: Any problem with the government's
24 proposal regarding the dissemination of the child pornography
25 rule, so-called silent witness issue? You'll have access to

1 it; the government will have access to it; the jury will have
2 access to it; I will have access to it. The public will not.

3 MR. SAVITT: I certainly don't disagree that the
4 public shouldn't -- you know, should not have access to it.

5 THE COURT: Well, last names of the victims, any
6 problem with that? No reason to give full names, is there?

7 MR. SMITH: Mr. Savitt objected to that, because it
8 is also the last name of the confidential informant. We don't
9 think it implicates anything. He obviously has identified who
10 the confidential informant is. We don't think it implicates
11 anything to refer to him by his first name and refer to
12 victims -- the intended victims by their first name. Their
13 relation with the confidential informant, it's also clear from
14 the tapes. There's no way to take out the fact that they are
15 his sons and niece.

16 THE COURT: As a practical matter, the
17 identification of the confidential informant will be there;
18 the testimony regarding the relationship will be there.

19 MR. SAVITT: I just don't want the jury to come to
20 any undue inference that somehow the confidential informant's
21 life has to be protected. I mean, I'm already hearing about
22 hit man for the first time in this case, which kind of makes
23 me a little more comfortable, because that's more familiar
24 ground for me, the kind of cases I tend to get assigned to,
25 but --

1 THE COURT: Okay. I think we're on the same page.
2 There's a projected objection to a hearsay objection to
3 statements of Mr. Baslan, tendered for the truth of the
4 matter. Obviously, if that's the case, that's an objection
5 we'll use. As a practical problem here, I don't know what
6 you're referring to, the statements of his on the tape?
7 You're referring to those or statements elicited by counsel in
8 examination of law enforcement witnesses?

9 MR. SMITH: No, I'm talking solely about statements
10 elicited by counsel during the examination of law enforcement
11 witnesses that would be serve to be falsely --

12 THE COURT: There's an objection asserted. It
13 appears to me that it's being offered for the truth. I'll
14 sustain the objection. I think that's about it.

15 MR. SAVITT: There is one other matter. In reading
16 through the 3500 materials that I received yesterday morning,
17 there are references in the informant Jack's 3500 material
18 that -- his disclosure to agents, that he had checked into
19 psychiatric institutions on a number of occasions and also
20 attempted suicide on a number of occasions. And I understand
21 that this is a very personal matter, but he is, presumably,
22 going to be the star witness for the government.

23 THE COURT: He may not appear.

24 MR. SAVITT: I don't have any hospital records. I
25 don't have any information about --

1 THE COURT: Do you have any information about that?

2 MR. SMITH: We provided the information we have. We
3 don't have any hospital records.

4 THE COURT: Do you know the hospital?

5 MR. SMITH: We -- I think we do know the hospitals.
6 I think they're actually in the 3500 material. I believe
7 there were five hospitals. We can identify for Mr. Savitt
8 where that's reflected.

9 THE COURT: Has he not been asked about his
10 psychiatric history?

11 MR. SMITH: We asked him about his psychiatric
12 history, and those questions -- or, really, those answers are
13 reflected in his 3500 materials. We did not then go get
14 hospital records. He represented that he was in psychiatric
15 hospitals a number of times, for a number of different things,
16 and we accepted those representations as sufficient.

17 MR. SAVITT: Perhaps I overlooked it, because there
18 were a number of things that I had to read. I didn't see the
19 name of hospitals, but that's not going to help me.
20 Your Honor is correct.

21 THE COURT: Not likely.

22 MR. SAVITT: I don't know what my cross-examination
23 can be involved in, other than accepting whatever it is that
24 Mr. Massery (phonetic) says as the truth. I'm entitled to
25 know why he checked in or was committed to psychiatric wards,

1 when that happened, whether he's on medication today. The
2 jury's entitled know whether this guy's a psycho or not.

3 THE COURT: You're entitled to know what the
4 government knows about that.

5 MR. SAVITT: But now that I know about it, how am I
6 going to find out this information? Hospital isn't going to
7 give it to me. I would have thought that the government has a
8 Giglio obligation to look at these hospital records and to
9 provide these records to me.

10 THE COURT: You know, that's not a bad point. I
11 assume he'd be willing to sign a waiver?

12 MR. SMITH: I assume that's correct.

13 THE COURT: Ask him. And if so, provide it to
14 Mr. Savitt. And if not, advise Mr. Savitt. Okay. Our
15 schedule next week, we're going to -- we start the trial
16 Tuesday morning first thing. Judge Pollak is, as you know,
17 picking the jury Monday morning. It's probably going to take
18 some time. Go ahead.

19 MR. SAVITT: May I?

20 THE COURT: Sure.

21 (Pause in proceedings.)

22 MR. SAVITT: Your Honor.

23 THE COURT: Yes, sir.

24 MR. SAVITT: If I may, just for the record,
25 Mr. Baslan is now standing next to me. He's asked me to

1 convey to the Court, with respect to one of the arguments
2 Mr. Smith made, that I have the contact information in the
3 discovery of these two women. I know that there are dozens of
4 contact information. Mr. Baslan actually advises me and
5 authorizes me to say that we're talking about 1250. It's
6 really hard for me to divide, that the government would pick
7 on two of those as --

8 THE COURT: No, I can appreciate that.

9 MR. SAVITT: That's one thing. The other thing,
10 Mr. Baslan did not tell me about that I found out about --
11 it's a little troubling to me. I just want to alert the Court
12 to this. We have a number of witnesses that -- potential
13 witnesses who would come in, should my client testify, as,
14 let's say, reputation witnesses or character witnesses,
15 however it develops.

16 Literally every single one of these witnesses -- I
17 don't know. The government is great. The FBI is terrific --
18 has been approached by the FBI, most recently as -- as recent
19 as two evenings ago. And they have a right to do that; that's
20 not a problem. Some witnesses spoke to them. Others refused,
21 at one time or another. One particular witness who was
22 married at one time to my client -- and I'm not going to go
23 into who she is, because she's married to a law enforcement --

24 THE COURT: I'm sorry?

25 MR. SAVITT: She's married to a law enforcement

1 individual, an important law enforcement authority outside of
2 the FBI. And FBI agents spoke to him and said that there are
3 people out there who have been lying to Mr. Baslan, and they
4 will be prosecuted, and that his wife should be aware of that
5 before she testifies. Now, I appreciate a public service
6 announcement, I really do. It's nice. It's sort of like
7 those announcements in crowded subways; inappropriate sexual
8 contact is not allowed just because it's crowded. But this
9 kind of comes really close to the line, if it doesn't
10 transverse the line, of subtle and, perhaps, not so subtle
11 intimidation of witnesses. I don't have any intention of
12 calling anybody to perjur themselves, I really don't.

13 THE COURT: I would think not, Mr. Savitt.

14 MR. SAVITT: Even if my client takes the stand, and
15 we're not sure he will, you know, I don't want to be in a
16 position where somebody is claiming that I'm suborning perjury
17 because a certain witness' account may differ from the
18 government's script. But to go about doing this really makes
19 it difficult, if not impossible, for me to call these
20 witnesses.

21 There is currently a prosecution hanging over the
22 head of one witness, potential witness, but I can't use her as
23 a witness, because this is part of the -- you know, the
24 obstruction case, which never went anywhere. And there was
25 supposed to be some evidentiary value in the computer storage

1 devices contained within contraption called a drobo. And the
2 government's gone through this, and there just isn't child
3 pornography. There's nothing of any evidentiary value. There
4 isn't obstruction here at all. I understand they have a
5 reasonable cause, or probable cause, to believe there is an
6 obstruction. I've listened to various tapes, and I couldn't
7 agree with them more that they had a right to look into them.

8 They had a right to send Mr. Solladie (phonetic) in,
9 too. I think he went too far twice, but they have that right,
10 and I don't quarrel with that. But my concern is that if
11 there is no case, and there's a person out there who's still
12 looking at sort of a dormant complaint, whose bail conditions
13 prevent her from having any contact, directly or indirectly,
14 with Mr. Baslan or his defense team. And we've had no contact
15 with her. I certainly haven't.

16 THE COURT: Who set those?

17 MR. SAVITT: Those conditions were imposed -- her
18 name is Podita (phonetic). So they were imposed by the
19 magistrate judge.

20 THE COURT: You are relieved, you, personally,
21 Mr. Savitt.

22 MR. SAVITT: Okay. There's another --

23 THE COURT: In the course of your representation and
24 responsibilities that go with it, you're at liberty to contact
25 any person.

1 MR. SMITH: Your Honor, I just note that Ms. Tessler
2 is represented by counsel.

3 MR. SAVITT: She's represented by Henry Mosserick
4 (phonetic).

5 THE COURT: Fair enough.

6 MR. SAVITT: Mr. Mosserick will trust me, but --

7 THE COURT: You understand your professional
8 obligation.

9 MR. SAVITT: Yes, I do. There's another witness
10 whose been subpoenaed in connection with a grand jury
11 investigation, again, with the obstruction. The subpoena is
12 still outstanding, and her lawyer, quite properly, told me
13 that we can't have any contact with his client, either. And
14 she's made potential trouble, because beyond a character
15 witness -- because the government, I believe, wants to
16 introduce evidence of certain diapers and other baby
17 paraphernalia in Mr. Baslan's home after he was arrested.

18 And this particular witness knows why the diapers
19 are there, and it has nothing to do with sex at all, and I
20 would have to call her as a witness if the government seeks to
21 introduce this evidence. And I'm also barred by this
22 continuing unnecessary pendency of a grand jury subpoena for
23 proceedings that, as I understand, are not even happening.

24 MR. SMITH: Your Honor --

25 THE COURT: What's your application?

1 MR. SAVITT: My application is to be able to speak
2 to her, too.

3 THE COURT: Why shouldn't he be able to speak to a
4 potential witness --

5 MR. SMITH: He certainly can contact her.

6 THE COURT: -- prospective or otherwise?

7 MR. SMITH: Or her counsel, to the extent she's
8 represented. And I would just -- the government disagrees
9 with the characterization of the investigation. I just want
10 to put on the record we strenuously disagree. Counsel has
11 misunderstood what the alleged obstruction was. Particularly,
12 the obstruction wasn't that there was inculpatory evidence on
13 that device, but, rather, the defendant intended to destroy
14 the device and then claim the FBI had it.

15 THE COURT: I understand.

16 MR. SMITH: And to the extent that any decision
17 that the Court is going to make is based on whether or not
18 that continues to be an ongoing investigation supported by
19 facts, the government is prepared to make an ex parte
20 submission on that basis.

21 THE COURT: This is a separation of powers. You
22 have your responsibilities. One hopes you're pursuing them in
23 an appropriate professional standard. Mr. Savitt has his. He
24 is at liberty to speak to, subject to counsel -- other
25 counsel's limitations, or authority, permission, to anybody

1 who may appear as a witness, for him or for the government,
2 period. End of suggestion. Any limitation to the contrary
3 set by the magistrate is vacated, with respect to counsel.

4 MR. SAVITT: Thank you, your Honor. With respect to
5 the witness whose married to a law enforcement officer, I hope
6 that what I'm saying is superfluous, and I believe it is, but
7 should she testify, should she at the end testify, I trust
8 that no adverse reaction will be held against her husband,
9 certainly, who has nothing to do with Mr. Baslan.

10 THE COURT: I got enough to do here.

11 MR. SAVITT: I know you do. I'm just saying that
12 because I'm concerned, too. I'm concerned about my witnesses
13 just like the government's concerned about theirs.

14 THE COURT: We understand.

15 MR. SMITH: Your Honor.

16 THE COURT: Yes.

17 MR. SMITH: There's one -- I have a couple questions
18 about the rulings you just made. There's also one I think you
19 didn't make. We requested permission if we seek to put in
20 Mr. Baslan -- the signed statement by Mr. Baslan and not put
21 in the entire post-arrest statements --

22 THE COURT: Why do you need my permission? You put
23 in what you put in.

24 MR. SMITH: We would seek to preclude questioning on
25 the remaining statements based on the --

1 THE COURT: This is a hearsay objection.

2 MR. SMITH: That's the hearsay objection.

3 THE COURT: Well, we'll see. It's very hard in that
4 context to make a -- first of all, to make an in advance
5 ruling. Second of all, some of it may have to come in just so
6 that we understand what's being said. If he says one thing on
7 your statement and he says a contrary thing on his, I think
8 he's entitled to bring it out. I could instruct the jury that
9 what he says -- you know, I can give them the limitation
10 instruction, but the jury should hear the whole thing.

11 I don't want to nickel and dime objections. When
12 there's two statements that relate to the same subject, one
13 says one thing, one says the other, it seems to me, just as a
14 matter of common sense, you give them both. And I do know
15 that there were, in fact, two sessions with Mr. Baslan, one
16 sit-down. There was the initial questioning. Then the agent
17 shared some information with him, and then the conversation
18 changed. So if that's the sort of thing you're referring to,
19 chances are I'm going to let it come in.

20 MR. SMITH: I just wanted to also ask what form you
21 would like of the proffer of the victims' statements.

22 THE COURT: Just send me a letter. Send us the
23 letter.

24 MR. SMITH: I'm happy to do that. I think it's
25 substantially what the fact section --

1 THE COURT: Mr. Savitt alluded to other things in
2 his statement here in court.

3 MR. SMITH: We'll make sure we put it in thorough
4 form and send a letter.

5 THE COURT: If they're in there and I just missed
6 them, God knows you've favored me with a lot of information in
7 a very short period of time. Later today I'm going to favor
8 you with one of my own.

9 MR. SMITH: I just wanted to notify for the Court
10 that our communications with the confidential informant have
11 been through counsel. He's represented, at this point. And
12 Byshawn (phonetic) Hecker at Devil Boys --

13 THE COURT: What's his status? Tell me about him,
14 if you don't mind my asking.

15 MR. SMITH: I mean, his status, at this point, is
16 that he's no longer a signed up confidential informant. As
17 we've indicated in papers before, he has some criminal
18 exposure. No decisions have been made as to him.

19 THE COURT: Is he going to testify? Will he testify
20 if you call him?

21 MR. SMITH: I expect that if we call him he will
22 testify. I mean --

23 THE COURT: Does he have any charges pending?

24 MR. SMITH: He has no charges pending. I would also
25 ask that prior to trial the documents on the docket filed by

1 the defense that identify the last name of the confident
2 informant be sealed, so it doesn't then just end up in
3 newspaper articles. The confident informant's last name,
4 which is the same as the last name of the victims -- the
5 intended victims. Sorry.

6 THE COURT: Tell me what -- you're asking to seal
7 those documents?

8 MR. SMITH: What we'd ultimately like is the
9 redacted version that doesn't have that last name mentioned.
10 We certainly have no problem with the contents, but to the
11 extent that the Court is instructing that that name not be
12 mentioned, to prevent --

13 THE COURT: I'm uncomfortable with that. I realize
14 they're relatives, and people can put two and two together.
15 I'm just not comfortable. Do you care?

16 MR. SAVITT: I do care. If the government was
17 concerned about it in advance, and the Court had ruled that I
18 was not permitted to mention the informant's last name, of
19 course I would abide by the order of the Court. I'm not
20 interested in creating a problem for the children, really I'm
21 not. I'll do whatever it is and agree to whatever the Court
22 believes is the appropriate remedy. This isn't a question of
23 just getting young children who don't know anything and
24 they're innocent into some sort of a cloud.

25 THE COURT: Absolutely.

1 MR. SAVITT: But by the same token, based on the
2 3500 materials that I read yesterday, I also found out for the
3 first time there were no charges against Jack, and I also
4 found out that he admitted that he was involved in sex with
5 underage girls. He was concerned about that because -- he
6 said that they were in Mr. Baslan's computer. And at some
7 point -- I don't know if he'll be prosecuted or not, but he'll
8 be a registered sex offender, and that's going to be available
9 to everybody to know as a warning. So, again, I'm not
10 interested in creating aspersions. I'll do whatever the Court
11 says.

12 THE COURT: Let's seal the documents. I'm inclined
13 to call the defendant -- the informant by his full name,
14 and -- although I guess people can put two and two together.
15 But, you know, the concern for the kids is compelling, and let
16 me rethink that. I'll let you know later today.

17 MR. SMITH: Thank you, your Honor.

18 THE COURT: For the time being, we'll seal it.

19 MR. SMITH: And one final request, the defendant has
20 indicated that he has some potential witnesses. We'd ask that
21 he disclose that in advance of the defense case, like at the
22 start of jury selection or at least on that day.

23 MR. SAVITT: Well, I'm happy to do it. The problem
24 is that I don't know who's going to be willing to testify, at
25 this point.

1 THE COURT: Willing is one thing, but planned
2 witnesses is another. Why don't you let them know. I'll be
3 around if you need me.

4 MR. SAVITT: Just as housekeeping, I don't know why,
5 but --

6 THE COURT: I don't like the word myself.

7 MR. SAVITT: I don't know what it means. Mr. Baslan
8 doesn't have any access to suits. However, I understand that
9 there are some clothing in your Honor's closet in the
10 courtroom.

11 THE COURT: Emergency stash.

12 MR. SAVITT: But we have quite a nice stash in Judge
13 Ross's courtroom as well, in connection with other cases.
14 Some courtesy, actually, of Ms. Marosi's fiance. In any
15 event, he'll be able to hopefully fit Mr. Baslan into those
16 clothing.

17 THE COURT: Hopefully or not, we're going to start
18 on time.

19 MR. SAVITT: I understand. I understand. This is
20 not a subterfuge to try to push things off to go shopping for
21 a week.

22 THE COURT: I don't think you'd do that, Mr. Savitt,
23 needless to say.

24 MR. SAVITT: Since Mr. Baslan is in the courtroom
25 today, and since I happen to have all the 3500 materials, it

1 may save time, as well as some CJA funds, if your Honor can
2 prevail upon the marshals to allow Mr. Baslan to look through
3 the 3500 materials, and then I'll collect it from him at the
4 end of the day.

5 THE COURT: Seems like appropriate accommodation.

6 MS. DEMAS: Your Honor, I would note that I had
7 already -- to effectuate the review by the defendant of
8 physical evidence, to the extent he wants to, there is a
9 proper room available for after this conference, and he's
10 certainly free to review his 3500 in that room.

11 MR. SAVITT: You're Honor, we'll take advantage of
12 that. Thank you.

13 MR. SMITH: Your Honor, I wanted to bring to
14 the Court's attention -- you may already know this, but the
15 Long Island Railroad is scheduled to strike in the midst of
16 this trial.

17 THE COURT: 5:30 this morning I heard it for the
18 first time, and I said, oh, my heavens. We can hope for the
19 best. If it comes to pass, we deal with it, but we're not
20 going to sit and wait for these folks to work out a contract.
21 I'm very much aware of it. We'll see -- maybe we'll get lucky
22 and get a jury, but, invariably, we'll have long hours. And
23 if the train does go out, traffic is just going to be an
24 abomination, so we'll have to deal with it in some fashion.
25 Tuesday, Wednesday, Thursday and Friday of next week, my hope

1 is to continue a four-day schedule. The following week,
2 Monday through Thursday, of course, once we complete the
3 proof, we will immediately convert to a five-day schedule.

4 MR. SMITH: Your Honor, I -- actually, I forgot to
5 mention something. The government has selected CD images.
6 We're just modifying our CD, because we need to call witnesses
7 to identify they're real children. We're adding one image
8 that a witness can identify as a real child. We'll have a
9 copy of that CD for the Court today, and I'll put in a letter
10 describing what we're talking about and what our plan is, as
11 far as introducing it.

12 THE COURT: I know as a legal matter they have to be
13 real people. But do we really need a witness to testify
14 they're real people?

15 MR. SMITH: We asked the defense to stipulate, and
16 they indicated they wouldn't, unless we stipulate that the
17 defendant himself was not involved in the production of any
18 child pornography, which --

19 THE COURT: I'm not going to get involved in horse
20 trading. Seems to me an unnecessary witness --

21 MR. SAVITT: That wasn't quite it. Maybe there's a
22 misunderstanding that the defendant was not involved in any
23 way, you know, with any of these children. Okay. Call it a
24 production of child pornography. My concern is that if I
25 stipulate that these are real children, that the jury may

1 be -- may decide that Mr. Baslan was involved in the
2 production of those materials. I think it can -- I don't
3 know. I can't do this, because I'm not smart enough, but the
4 government has people out there that can probably tell us
5 where these videos came from, I'm sure.

6 THE COURT: I'll leave that to you gentlemen.

7 MR. SAVITT: All right. Not a problem.

8 THE COURT: As I said, I'll be around. I'll be
9 available. Judge Pollak first thing Monday morning, as we
10 agreed. If you need to see me, just give Gabby a call or one
11 of my clerks a call. Mike has the case. And we'll see you
12 next week.

13 MR. SAVITT: I believe we've gone through this, but
14 in the exercise of caution, we agree to the selection of the
15 jury by the magistrate judge.

16 THE COURT: My notes so indicate.

17 MR. SAVITT: Okay. Just want to make sure.

18 MR. SMITH: Thank you, Judge.

19 (Proceedings adjourned.)

20

21 * * *

22 I certify that the foregoing is a true and correct
23 transcription of the record from proceedings in the
above-entitled case.

24 /s/ Nicole Canales
25 Nicole Canales

May 26, 2015
Date